

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1991

KELLY KARE, LTD.; JOAN C. KELLY; KEVIN McNULLA, on behalf of himself and all others similarly situated; and CHARLOTTE COHEN, on behalf of herself and all others similarly situated,

*Petitioners,*

vs.

ANDREW P. O'ROURKE, Westchester County Executive; WESTCHESTER COUNTY; WESTCHESTER COUNTY DEPARTMENT OF SOCIAL SERVICES; JOHN J. ALLEN or his successor, Commissioner of the Westchester County Department of Social Services ("WCDSS"); S. REITANO, First Deputy Commissioner WCDSS; PHYLLIS SHEARER, Deputy Commissioner WCDSS; JOSEPH J. CAMPANELLA, Program Coordinator of WCDSS; JOSEPH J. LOSCRI, Accountant WCDSS; PATRICIA QUIRK, Supervising Examiner WCDSS; ADRIENNE YOUNG, Program Coordinator of WCDSS; MS. CALIFANO, WCDSS Supervisor; CINDY CAPONE, WCDSS Personal Care Worker; and DONALD WILLIAMS, WCDSS Caseworker,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF OF WESTCHESTER COUNTY RESPONDENTS IN  
OPPOSITION TO PETITION FOR WRIT OF CERTIORARI**

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QUESTION PRESENTED

1. Whether section 364(2)(b) of New York's Social Services Law creates a property interest in a qualified Medicaid provider's continued and uninterrupted participation in the program, (i.e., a continuing reimbursement contract), so as to entitle the provider to a due process hearing prior to termination from participation?

2. Whether Petitioner, Kelly Kare Ltd., a provider of health care services, has a constitutionally protected property interest in continued and uninterrupted participation in the Medicaid program, where both a regulation of the New York

State Department of Social Services and a similar provision in Petitioner's contracts at bar with the local social services district allow for without cause termination of the home health care provider's Medicaid reimbursement contract?

3. Whether Petitioner Kelly Kare, Ltd.'s patients have a constitutionally protected property or liberty interest to demand Kelly Kare, Ltd. as their health care provider when Kelly Kare, Ltd.'s Medicaid reimbursement contract had been properly cancelled by a local social services district?

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Westchester County Respondents  
accept the Petitioners' citation of the  
opinions below which are reproduced in  
the Appendix to the Petition for  
Certiorari.

STATEMENT OF THE CASE

The Westchester County Department of Social Services ("WCDSS") is a local social services district, and in that capacity, administers personal care services to those declared Medicaid\* eligible under federal and New York State law to receive such assistance. The WCDSS funds a portion of the total cost of these services, and receives federal and state reimbursement. Each provider is required to comply with federal and state law and regulations and receives payment directly from the New York State Department of Social Services (NYSDSS).

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\*Title XIX and XX of the Social Security Act (42 U.S.C. §1396 et seq.), provide for programs of services to eligible Medicaid recipients.

The WCDSS completes a prior approval form for each provider every six (6) months and the NYSDSS assigns a Medicaid Management Information Systems (MMIS) number which makes it possible for the provider to receive payment.

On January 24, 1990, the County of Westchester Department of Social Services and Kelly Kare, Ltd. entered into contracts whereby Kelly Kare would provide Title XIX and XX Services for the County.\* The terms of these contracts were for the limited period of January 1, 1990 through December 31, 1990.

The contracts provided:

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\*Kelly Kare contracted with WCDSS for the provision of personal care services since 1987. The terms and conditions of the previous contracts did not differ materially from the 1990 contract except for the rate schedules.

"The Commissioner of the Department of Social Services or his duly authorized designee shall have the option to terminate this Agreement without cause or for cause other than those set forth in Section 515.3(e) of the New York State Social Services Regulations. Such termination to be effective thirty (30) days subsequent to notice to the Contractor or by certified mail, return receipt requested to the Contractor's address as set forth in this Agreement..."

This clause, allowing the Commissioner, in his discretion to terminate the contract without cause is specifically authorized by a regulation of the New York State Department of Social Services which states:

"A provider's participation in the program may be terminated by either the provider or the department upon thirty days' written notice to the other without cause."

Section 504.7(a) of Title 18, of the New York Code, Rules and Regulations, 18 N.Y.C.R.R. §504.7(a).

Neither the contract clause nor section 504.7(a) of the regulation affords a hearing to the terminated provider.\*

On or about October 26, 1990, the WCDSS availed itself of its option under the subject contracts to terminate Kelly Kare's 1990 contracts without cause upon thirty days notice.

Petitioners, Kelly Kare, its employees and the Medicaid patients served by Kelly Kare commenced a lawsuit in the United States District Court for the Southern District of New York challenging the without cause termination and alleging that the termination violates various purported federal and constitutional rights of the plaintiffs and sought

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\*The right to terminate without cause is also made available to the contractor both pursuant to the contract and the regulations.

preliminary injunctive relief.

The Decision of the Lower Court

By written opinion and order entered December 7, 1990, the United States District Court (GOETTEL, J.), after hearing oral argument and reviewing the pleadings, affidavits, deposition transcripts, other extensive exhibits, and the memoranda of law submitted by the parties, denied Kelly Kare's motion for a preliminary injunction and also dissolved the limited restraining order issued by the Court on November 22, 1990 conditioned upon Kelly Kare's undertaking. 751 F.Supp. 1154 (S.D.N.Y. 1990)

In so ruling, the District Court addressed and rejected each of Kelly Kare's claims as meritless and unsubstantiated, including Kelly Kare's purported property and liberty claim

interest as a Medicaid provider in continuing participation in the program. The Court also rejected Kelly Kare's patients' claim that they have a due process right to demand a specific Medicaid provider.

On or about December 11, 1990, Kelly Kare filed a notice of appeal from the denial of its motion for a preliminary injunction with the Court of Appeals for the Second Circuit.\*

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\*Kelly Kare Ltd, et al, moved for an expedited appeal and an injunction pending appeal. The Second Circuit issued a temporary injunction continuing Kelly Kare's contract pending oral argument of the appeal on January 9, 1991. At oral argument of the appeal, the Second Circuit dissolved the temporary injunction.

Thereafter, the Petitioners filed an application with this Court for a stay pending disposition of the appeal by the United States Court of Appeals for the Second Circuit. Petitioners' application was denied by Justice Thurgood Marshall on January 15, 1991. See, letter from this Court dated January 15, 1991 annexed as an Appendix to this brief.



The Decision of the Second Circuit

The Court of Appeals for the Second Circuit, in a unanimous decision issued April 5, 1991, affirmed the United States District Court for the Southern District's denial of Kelly Kare's request for a preliminary injunction and upheld the County's right to terminate a Medicaid provider's contract "without cause" upon thirty days notice. 930 F.2d 170 (2d Cir. 1991).

By so ruling, the Second Circuit declared that Kelly Kare has no property or liberty interest in continued and uninterrupted participation in Westchester County's Medicaid program. The Court further rejected Kelly Kare's patients' contentions that they had been deprived without due process of their statutorily granted freedom of choice of Medicaid providers, by holding that

Medicaid only entitles patients choice among qualified providers, and not to a specific Medicaid provider. Id. at 177-78.

On May 14, 1991, Kelly Kare Ltd's petition for rehearing with a suggestion for rehearing, in banc, was denied.

SUMMARY OF ARGUMENT

This case is not of special importance as the Court of Appeals' decision conflicts neither with decisions of this Court nor other Circuits.

As the lower Courts here held and as the record below plainly demonstrates, Petitioner, Kelly Kare, Ltd., has failed to establish that it has a continuing, uninterrupted property right at bar to participate in the Medicaid program. Neither section 364(2)(b) of New York's Social Service Law creates such a property interest nor do the regulations of the New York State Department of Social Services or the Petitioner's reimbursement contract with the local social services district, since both allow the governmental entity to terminate participation without cause.

Furthermore, this Court's ruling in O'Bannon v. Town Court Nursing Center, 447 U.S. 773 (1980) makes it clear that Medicaid's freedom of choice provision is not absolute and that Medicaid recipients do not have any property right to demand a specific Medicaid provider.

ARGUMENT

THE PETITION FOR A WRIT OF  
CERTIORARI SHOULD BE DENIED

- A. The Petition does not present  
special or important reasons  
warranting review

Petitioners assert that the Court of Appeals for the Second Circuit erroneously rejected their contentions that (1) New York's Social Services Law section 364(2)(b) creates a property interest for health care providers in continued and uninterrupted participation in the Medicaid program; and (2) health care provider's patients have a constitutionally protected property and liberty interest under the Medicaid program's "freedom of choice" provision (42 U.S.C. §1396a(23)(A)) in choosing a specific provider as their health care provider.

This Court, however, has never regarded its function as simply correcting

a legal error perceived by disappointed litigants in a lower Court decision.

As recognized by the Second Circuit's opinion, Petitioners here fail to establish such a statutory entitlement in New York Social Services Law §364(2)(b) to continued and uninterrupted participation in the Medicaid program. Patently, that statute and the regulations promulgated pursuant to that statute do not impede a local social services district's ability to terminate a contract without cause with one of its providers. Rather, to the contrary, the intent of the law is to provide the New York State Department of Social Services the authority and responsibility to terminate the license of providers according to standards established thereto.

As the Second Circuit reasoned, there is an obvious and "critical difference

between being declared a qualified health-care provider and being awarded a contract to furnish health care services. The refusal by a social services district to enter a contract with a qualified provider in no way affects the status of the provider. Such a disappointed provider remains free to seek a contract with another social services district." 930 F2d at 176.

The Second Circuit drew upon its previous opinions in Plaza Health Laboratories, Inc. v. Perales, 878 F.2d 577 (2d Cir. 1989); Patchogue Nursing Center v. Bowen, 797 F.2d 1137 (2d Cir. 1986), cert denied, 479 U.S. 1030 (1987); and Case v. Weinberger, 523 F.2d 602 (2d Cir. 1975) as well as cases from New York State courts in Ray Pharmacy, Inc. v. Perales, 564 N.Y.S.2d 767 (A.D. 1st Dep't 1991) and Bezar v. New York State

Department of Social Services, 151 A.D.2d 44 (3d. Dep't 1989) in support of its analysis.

Nor does the plain language contained in section 364(2)(b) of the New York Social Services Law, the New York Department of Social Services regulations, or the contractual provisions at bar support the Petitioners' baseless arguments.

As the Second Circuit observed, to the contrary, the express wording contained in section 364(2)(b) clearly "belies Petitioners' claim that it has a right to participate in the program. The statute specifically focuses on a health care provider's status as qualified; continuous participation is not even addressed." 930 F.2d at 176.

Furthermore, the regulations and the contract explicitly permit the local social services district to terminate



participation without cause. Consistent with prior rulings, [see, e.g. Plaza Health, 878 F.2d at 581; Walentas v. Lipper, 862 F.2d 414, 419 (2d Cir. 1988), cert. denied, 490 U.S. 1021 (1989); RR Village Ass'n v. Denver Sewer Corp., 826 F.2d 1197, 1201-02 (2d Cir. 1987)], the Second Circuit opined that "[s]uch vast discretion over the conferral of a governmental benefit - namely, continued, uninterrupted participation in Medicaid-is fatal to a claim of entitlement to that benefit." 930 F.2d at 176.

Moreover, the contract, on its face, expressly provides that it is terminable without cause. As the District Court here emphasized, "if all public contracts were per se a property interest, the effect would be the constitutionalization of the contractual

relationships of all governmental contractors. No court has acknowledged such a claim of entitlement.

See e.g., S&D Maintenance Co., Inc. v. Goldin, 844 F.2d 962 (2d Cir. 1988)."  
Kelly Kare, Ltd. v. O'Rourke, 751 F.Supp. at 1156.

As further discussed, infra, contrary to the Petitioners' other meritless argument, the health-care provider's—patients do not have a property or liberty interest to choose Kelly Kare, Ltd. as their provider, under this Court's ruling in O'Bannon v. Town Court Nursing Center, 447 U.S. 773 (1980).

B. There is no conflict between the Court of Appeals decision below and decisions of this Court

Contrary to Petitioners' erroneous contentions, there is no conflict between the decision of the Court of Appeals for the Second Circuit and the decision of this Court in O'Bannon v. Town Court Nursing Center, 447 U.S. 773 (1980) on the issue of a Medicaid recipient's "freedom of choice" among qualified Medicaid health-care providers.

In O'Bannon, this Court determined that Medicaid-eligible nursing home patients do not have a vested right to choose a nursing home that was being decertified as a health-care provider. Id. at 785. In so ruling, this Court declared that the "freedom of choice" provision was intended to give beneficiaries "the right to choose among a range

of qualified providers, without government interference". Id. (emphasis in original).

Consistent with this Court's opinion in O'Bannon, the Second Circuit here reasoned that the "range of qualified providers" extends no further than those providers under contract with the local social services district at any given time:

"We read O'Bannon as holding that a Medicaid recipient's freedom of choice rights are necessarily only dependent on a provider's ability to render services. No cognizable property interest can arise in the Medicaid recipient unless the provider is both qualified and participating in the Medicaid program. When the source of government benefits runs dry through legitimate state action, beneficiaries are hard-pressed to establish a legitimate entitlement to that benefit. See O'Bannon 447 U.S. at 798, 100 S.Ct at 2482 (Blackmun, J. concurring)."

Kelly Kare, Ltd. v. O'Rourke, 930 F.2d at 178.

Accordingly, contrary to Petitioner's disingenuous conjecture, the Second Circuit properly concluded that Kelly Kare, Ltd.'s patients do not have a property interest in their freedom to choose Kelly Kare, Ltd. as their provider because Westchester County has properly cancelled Kelly Kare, Ltd.'s reimbursement contract.

Furthermore, consistent with this Court's holding in O'Bannon, the Second Circuit correctly ruled that the health care patients at bar do not have a cognizable liberty interest in choosing Kelly Kare, Ltd. as their health-care provider.

As the Second Circuit observed here, in O'Bannon, 447 U.S. at 786-88, this Court distinguished between direct

Medicaid benefits - financial assistance - and indirect benefits - e.g. freedom of choice, by holding that state action that incidentally burdens an indirect governmental benefit does not rise to the level of a deprivation of any interest in life, liberty or property. Kelly Kare Ltd v. O'Rourke, 930 F.2d at 178.

Consistent with this Court's decision in O'Bannon, the Second Circuit concluded, Petitioner Kelly Kare's health-care patients "have suffered an incidental burden on their right to choose among qualified and participating health-care providers. Their direct benefits clearly have not been altered. They shall continue to receive government-sponsored home health assistance, albeit from a different provider. Such an incidental burden certainly does not, infringe on any liberty interest." Id.

C. There is no conflict  
among the Circuits

Contrary to Petitioners' tenuous insinuations, there is no conflict between the Second Circuit's decision at bar with prior decisions of the Second Circuit or among the decisions of other Circuits on the two issues Petitioners seek to raise, namely, a Medicaid provider's purported property interest in continued Medicaid participation and freedom of choice rights of Medicaid recipients.

Petitioners cite two prior decisions of the Second Circuit, Patchogue Nursing Center v. Bowen, 797 F.2d 1137 (2d Cir. 1986) cert denied, 479 U.S. 1030 (1987) and Case v. Weinberger, 523 F.2d 602 (2d Cir. 1975), and the decision of the Seventh Circuit in Hathaway v. Mathews, 546 F.2d 227 (7th Cir. 1976) to intimate

a conflict among the Circuits on the first issue, and cite one decision of the Eleventh Circuit in Silver v. Baggiano, 804 F.2d 1211 (11th Cir. 1986) on the second issue, as justifying a writ of certiorari. A cursory review of these decisions demonstrates that the alleged conflicts are illusory.

As the Second Circuit observed, both Patchogue Nursing and Case (in which the Court found a property interest in continued participation in Medicaid) involved circumstances totally dissimilar to the matter at bar, since those cases involved nursing homes that were facing suspension or removal of their federal certification as qualified nursing homes. Furthermore, when the Second Circuit decided Patchogue Nursing and Case, New York's regulatory scheme did not provide



for without cause termination.

Hathaway v. Mathews, to the extent that it remains good law, (see Americana Healthcare Corp. v. Schweiker, 688 F.2d 1072 (7th Cir. 1982) cert denied, 459 U.S. 1202 (1983) (where the Seventh Circuit made negative reference to that decision)\* presented facts and circumstances clearly distinguishable from those present at bar, as that case involved decertification of a nursing home. In Hathaway, a nursing home owner brought suit challenging a decision of the Department of Health, Education (HEW) and Welfare to terminate Medicaid benefits allocated for patients in the

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\*The Seventh Circuit further remarked that "[t]o the extent that Hathaway remains good law within the circuit, it is limited to its unique factual situation..."Americana Healthcare Corp. v. Schweiker, 688 F.2d at 1083.

nursing home because the home allegedly did not comply with federal standards.

In that case, the Seventh Circuit held that the federal government could not terminate Medicaid payments allocated for residents of the nursing home until it had first given the nursing home notice of charges against the home and conducted a hearing in which the owner could challenge the validity of those charges, absent an indication of an emergency which would justify a post-termination hearing.

Silver v. Baggiano is also completely inapposite to the matter at bar. The issue before the Court in that case involved whether the "freedom of choice" provision of the Social Security Act created rights enforceable by health care providers, an issue which was

remanded by the Eleventh Circuit to the district court. The case lends absolutely no support to Petitioners' claim that a Medicaid recipient has a right to receive health care services from a specific health care provider.


CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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By

  
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September 4, 1991

## **APPENDIX**



SUPREME COURT OF THE UNITED STATES  
OFFICE OF THE CLERK  
WASHINGTON, D.C. 20543

JOSEPH F. SPANIOL, JR.,  
AREA CODE 202  
Clerk of the Court 479-3011

January

15, 1991

Ms. Marilyn J. Slaaten  
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Re: Kelly Kare, Ltd., et al.,  
v. Andrew P. O'Rourke,  
Westchester County Executive,  
et al., Application No. A-539

Dear Ms. Slaaten:

The application for a stay pending final disposition of appeal by the United States Court of Appeals for the Second Circuit in the above-entitled case has been presented to Justice Marshall, who on January 15, 1991 endorsed thereon the following:

"Application Denied  
Thurgood Marshall  
1/15/91"

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk

By

Francis J. Lorson  
Chief Deputy Clerk

NOTE - FOR YOUR INFORMATION: A copy of this letter has been sent to all interested parties shown on the attached notification list.



